Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

LARRY HARDY,

Petitioner,

vs.

DEPARTMENT OF SOCIAL SERVICE , STATE OF LOUISIANA, DISTRICT ATTORNEYS' OFFICE FOR THE PARISH OF AMITE, AND DIANE OSBY,

Respondent(s).

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Kenneth M. Plaisance
Attorney for Petitioner
2067 North Miro Street
New Orleans, Louisiana 70119
Telephone: (504) 945-4176

37pp

QUESTIONS PRESENTED FOR REVIEW

The basic premise is--if the woman decides to have a child, and that decision is **legally** unilateral (her choice alone), should the obligation of child support be bilateral or mutual or should the obligation be her responsibility and hers alone, and whether consensual sex is consensual procreation.

The U.S. Supreme Court fashioned the law through the penumbra rights of the U. S. Constitution which grants a woman a unilateral right of privacy to choose whether to bear a child or to abort. The U.S. Supreme Court held that the government can not infringe upon the woman's right to choose, and also ruled that the woman does not have to get the consent nor notification from the husband or man to decide to bear a child. On the other hand, Louisiana has enacted the Louisiana Paternity Act LSA- R.S. 9:396- a statutory scheme which infringes on the man's right to privacy to choose whether to procreate by forcing a man through an exparte order to give blood to prove paternity, and then forcing an obligation of child support based on the woman's unilateral decision. The question(s) presented are:

1. Whether the woman's right to decide to bear a child in connection with the Louisiana Paternity Act infringes on the man's right to privacy to choose whether to procreate, and does this scheme force an obligation on the man to pay child support based on the woman's unilateral decision to have a child..

2. Whether this scheme is constitutional under the Fourth Amendment, Penumbra Rights, and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by applying the laws unequally.

3. Whether or not the false accusation of paternity can defame a person's reputation.

TABLE OF CONTENTS

Page

Questions presented for review i

Table of Contents ii

Table of Authorities iv

Opinions below 2

Statement of Jurisdiction 2

Constitutional Provision Involved 2

Concise Statement of the Case 3

Reasons for Granting the Writ 7

I. The decision below in failing to declare that the woman's unilateral right to privacy to choose whether to abort or bear a child (without the consent of the father) conflicts in principle and infringes on the man's constitutional right to privacy to choose whether or not to procreate. The woman's right to privacy fashioned from the penumbra rights impairs the man's right to privacy to choose whether to procreate. This unequal treatment of the law leads to abuse in the area of child support. 7

Contents

Page

II. The woman's unilateral right to choose in connection with Louisiana Paternity Act LSA R. S. 9:396 violates applicant's right to privacy and forces an obligation based on a unilateral decision. 11

III. The lower courts' decision by failing to declare Louisiana Paternity Statute unconstitutional infringes on the Equal Protection clause of the Fourteenth Amendment because the statute applies the right to privacy unequally and by granting the mother an attorney to represent her in the matter, but does not equally grant the man an attorney to represent him in establishing paternity. . . .15

IV. The lower courts' decision by failing to declare the false accusation of child support slander and defamatory is a novel issue and was ripe for consideration. . . . 17

Conclusion 23

Certificate of Service 25

Contents

Page

TABLE OF CASES AND AUTHORITIES

PAGE

Califano v Webster,
430 U.S. 313, 314, 97 S. Ct. 1192, 1193,
51 L.Ed. 2d 360 (1977). 14
Cangelosi v. Schwegmann Bros. Giant Super Markets,
390 So. 2d 196 (La. 1980) 19
Carey v. Population Servs., Inc.,
431 U.S. 678 U.S. 678, 684-85,
97 S. Ct. 2010, 2015-16 52 L.Ed. 2d 675 (1977) . 7, 8
Craig v. Boren, 429 U.S. 190, 197,
97 S. Ct. 451, 457, 50 L.Ed.2d 397 (1976). 14
Coe v. Gerstein,
376 F. Supp. 695-698 (S.D. Flor. 1974) 10
Cox Bradcasting Corp. v. Cohn,
420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed. 2d 328 (1975)21
Doe v. Doe, 941 F.2d 280 (5th Cir. 1991) 21
Eisenstadt v. Baird,
405 U.S. 438, 453,
92 S. Ct 1029, 1038, 31 L.Ed 2d 349 (1972). 8
Elmer v. Coplin,
485 So. 2d 171 (La. App. 2d Cir. 1986), writ denied,
489 So.2d 246(La. 1986) 20
Gertz v Welch,
418 U.S. 323, 41 L Ed 2d 789,
94 S. Ct. 2997 (1974) 18

Contents

Page

Griswald v. Connecticut,
381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed. 2d 510 (1965) . 8
Gugliuzza v. K.C.M.C.,
606 So. 2d 790 (La. 1992). 19
In Interest of J.M., 590 So. 2d 565(La. 1991) . . . 11, 13
Houdroulis v Schuhmacher,
553 So. 2d 398 (La. 1989). 11
Jaubert v. Crowley Post-Signal, Inc.,
375 So.2d 1386, 1388 (La. 1979) 21
Kent v. Dulles,
357 U.S. 116, 126,
78 S.Ct. 1113, 2 L.Ed.2d 1264 (1958) 10
Lassiter v. Dept. of Social Services,
452 U.S. 18, 28, 101 S.Ct 2153, 2160,
68 L.Ed.2d 640 (1981) 13
Little v. Streater, 452 U.S. 1, 14, 101 S.Ct. 2202,
2209, 68 L. Ed, 2d 627(1980) 13
Luster v. Retail Credit, Co., 575 F.2d 609 (1981). . . . 18
Madison v. Bolton, 102 So. 2d 433 (1958) 20
Martin v. Lincoln General Hospital, et al.,
588 So 2d 1329 (La. App. 2 Cir. 1991) 21
Maryville Academy v. Loeb Rhoades & Co., Inc.,
530 F.Supp 1061 (D. C. 1973) 22
Mathews v. Eldridge,
424 U.S. 319, 96 S.Ct. 2593
47 L. Ed. 2d 18 (1976) 13
Melancon v. Hyatt Corporation,
589 So. 2d 1186 (La. App. 4th Cir. 1991),
writ denied, 592 So. 2d 411 (La. 1992). 20

Contents

Page

Montgomery Ward &Co. v. McGraw Hill Pub. Col,
146 F.2d 171 18
Nordgren v. Mitchell,
716 F.2d 1335, 1338 (10 Cir. 1983) 13 14, 15, 22
Olmstead v. United States,
277 U.S. 438, 478, 48 S.Ct 564, 72 L.Ed.944 (1928) . 10
Plaquemine Parish Commission Council v. Delta
Development Co, Inc.,
472 So.2d 560, 567-68 (La. 1985). 13
Planned Parenthood of Central Missouri v Danford,
428 U.S. 52, 96 S.Ct 2831, 49 L.Ed. 788 (1976) . .9, 10
Planned Parenthood of Southeastern Pennsylvania v
Carey, 505 U.S. ___ ,112 S.Ct. 2791,
120 L.Ed.2d 674, (1992) 9
Regan v. Sullivan, 557 F.2d 300, (1980) 18
Roe v. Wade,
410 U.S. 113, 93 S.Ct. 705,
35 L.Ed 2d 147 (1973). 9, 10, 11, 13 23
Toomer v. Breaux,
146 So.2d 723 (La. App. 3d Cir. 1962) 21
Winston v. Lee,
470 U.S. 753,760, 105 S.Ct. 1611,
84 L.Ed.2d 662 (1985) 13

LAW/STATUTES

28 U.S.C. section 1254(1) et seq. 2
28 U.S.C. Section 1291 2
Fourth Amendment of the U.S. Constitution 8
Fourteenth Amendment of the U.S. Constitution 16
Article I, Section 5 of the Louisiana Constitution 8

Contents

Page

Article I, Section 3 of the Louisiana Constitution . . . 16
Article 240 of the Louisiana Civil Code 12
Article 99 of the Louisiana Civil Code 18
Article 2315 et seq. of the LA. Civil Code . . . 18,.19, 21
Louisiana Revised Statutes 9:396 . . . . . 10, 12, 14, 21
Louisiana Criminal Code 14:47 . . . . . 18, 20

TREATISES

1 Litvinoff, Obligation Section 320 in 6 Louisiana Civil Law Treatise 567 (1969).]
Devlin, Privacy and Abortion Rights Under the Louisiana State Constitution,
51 La. L. Rev. 685 (1991) 9, 14
Payne, Fraud Affecting Child Support, 2 ALR 5th 337
Payne, Sexual Partner's Tort Liability to other Partner For Fraudulent Misrepresentation regarding sterility or use of birth Control resulting in Pregnancy,
2 ALR 5th 301
53 C.J.S. Section 75 Libel and Slander. 22
56 C.J.S. Section Malicious Prosecution 22
53 C.J.S. Section 38 Libel and Slander 21
Restatement 2d, Torts Section 574 22
Prosser, Law of Torts, 4th ed. (1971) 22
Restatement Second of the Law of Torts (1959) 22

Contents

Page

APPENDIX

Appendix A --- U.S. Fifth Circuit Court of Appeal Decision August 12, 1996 . . . . . 1a

Appendix B --- Judgment from the United States District Court Eastern District of Louisiana . . 2a

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Larry Hardy respectfully petitions for a writ of certiorari to review the judgment of the courts below.

OPINIONS BELOW

As far as Plaintiff is aware, the district court and court of appeals decisions are unreported. Both decisions are reproduced in the appendix.

STATEMENT OF JURISDICTION

The U. S. District Court for Eastern District of Louisiana entered its judgment on December 18, 1995. The U. S. Court of Appeals for the Fifth Circuit affirms the lower court's decision on August 12, 1996. The statutory provision believed to confer on this Court jurisdiction to review by writ of certiorari is 28 U.S.C. section 1254(1) et seq. and/or the Court's appellate jurisdiction is 28 U.S.C. Section 1291. This is an appeal from a final judgment.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment and the Penumbra rights of the United States Constitution gives each United States citizen the right to privacy and to be free from governmental intrusion.

Fourteenth Amendment of the United States Constitution provides that:

> No State shall make or enforce any law nor deny to any person within its jurisdiction the equal protection of the law.

CONCISE STATEMENT OF THE CASE

This petition raises fundamental questions concerning the power of Federal and State government to intrude and invade on the man's right of privacy to choose whether or not to procreate ; and by forcing a blood test (which is not an exact science), through the Louisiana Paternity Act, and then, forcing an obligation of child support. On the other hand, the Government(s) can not infringe upon the woman's right to privacy to choose whether to bear a child or to abort. The government unequally applies the right to privacy by gender and violates the 4th Amendment, the Penumbra Rights, Equal Protection Clause of the 14th Amendment of the U.S. Constitution, and the Louisiana State Constitution as well. In addition, the lower courts failed to address: Whether, if one party is acting alone in deciding to have a child, then should the consequence and responsibility of her act be her own as well. Whether consensual sexual behavior is consensual procreation.

It appears that the woman's right to privacy supersedes the man's right to privacy to choose whether or not to procreate. The significance and consequence of this unequal application of the right to privacy gives the woman the ultimate decision, not only over the life and death of the child, but also over the man's finances by forcing an obligation of child support based on her unilateral decision to bear the child. Ironically, the decision is unilateral but the obligation and responsibility is bilateral. This phenomena has a devastating effect on

relationships and the contract of marriage, and effects the man in unbelievable ways. This scheme allows the mother to bear a child without government intrusion and without the consent or notification of the father. This scheme also allows the government to protect and conserve the State's public assistance funds by dumping the responsibility and prosecuting the man for child support. This is a sophism and a fallacy of the law. To hide this fallacy, women, society, aided by the law, the government, and the media labels the father as dead-beat-dads, ridicules, embarrasses, defames a man's reputation in his community, and places a stigma of irresponsibility on men. **Ironically**, this stigma of irresponsibility is based on a woman's unilateral decision to have a child. The mother initiates the paternity action through the State. The Department of Social Service or the District Attorney's Office represents the mother and files the petition to establish paternity and support, but the State conveniently and unequally fails to represent the man. The man is not granted an attorney, nor is read his rights, but is ordered into court to give blood. Most men do not have the means to pay an attorney, and are scared that they will be either put in jail for not paying child support or defamed and embarrassed by not being responsible. Men are pressured by society and gives into the fallacy. The District Attorney uses this as a scare tactic to coerce a consent judgment. Once the consent judgment is signed, the man has given up his rights. The petition also raises the question whether false statements of paternity are defamatory.

A. Proceeding and Disposition Below.

On or about May 5, 1995, the State of Louisiana Department of Social Service through the District Attorney's Office of the City of Amite, Louisiana, filed a petition to establish paternity against Larry Hardy, petitioner, in the Twenty-First Judicial District for the Parish of Tangipahoa. (Docket # 95-01317) On or about May 8, 1995, the District Attorney's Office for the City of Amite, served Mr. Hardy a petition to establish paternity and support. Petitioner was ordered to show cause on the 28th of July, 1995 at 8:30, why he should not be ordered to prove paternity. Mr. Hardy, a citizen of New Orleans, and a Jehovah witness, and who has never met his accuser, was not granted an attorney to represent him and was forced to disprove paternity. Petitioner, through undersigned, submitted exceptions of no cause of action and no right of action, improper venue, answered the petition to establish paternity and child support, and filed a motion to continue. The motion to continue was granted. On August 2, 1995, petitioner filed in the U.S. District Court for the Eastern District of Louisiana a preliminary injunction and a declaratory judgment declaring that a woman's unilateral and constitutional right to privacy to choose whether to bear a child and Louisiana Revised Statute. 9:936 are unconstitutional. Petitioner later amended and complained of defamation. On August 17, 1995, the preliminary injunction was denied but the declaratory judgment was deferred. On or about August 18, 1995, a hearing to prove or disprove paternity was held in 21st Judicial Court of Amite, Louisiana. Applicant observed

that the 21st Judicial Court room was used to administer the blood test. This is significant because it appeared that the court was quickly herding men into court to prove paternity without men being provided with attorneys or advised on their constitutional rights. It appeared that the court was coercing the accused men into signing a consent of paternity and child support for suspect reason and or for judicial economy. At the hearing, on August 18, 1995, Dianne Osby testified that petitioner was not the Larry Hardy she had sexual intercourse with, and therefore, petitioner was not the father of Keyatta Osby. The Court dismissed the petition to establish paternity. Petitioner requested attorney fees, court costs, and damages. However, the court failed to rule on damages and attorney fees. Although petitioner was exonerated, petitioner has been inconvenienced, ridiculed, and defamed. Petitioner states that there is something inheritly wrong with this scheme, and strongly believes that if had he not retained an attorney, he would have been coerced into signing a consent judgment or found to be the father of the child by default. On November 16, 1995, Petitioner moved for a rule to reset plaintiff's declaratory judgment to declare that the woman's unilateral right to choose and LSA 9:396 unconstitutional. On December 18, 1995, judgment was entered denying plaintiff's declaratory judgment and the court dismissed petitioner's defamation claim. On January 11, 1996, appellant timely filed an appeal. On August 12, 1996, the U.S. Fifth Circuit Court of Appeals affirmed the lower courts' ruling.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW BY FAILING TO DECLARE THAT THE WOMAN'S UNILATERAL RIGHT TO PRIVACY TO CHOOSE WHETHER TO ABORT OR BEAR A CHILD (WITHOUT THE CONSENT OF THE FATHER) CONFLICTS IN PRINCIPLE AND INFRINGES ON THE MAN'S CONSTITUTIONAL RIGHT TO PRIVACY TO CHOOSE WHETHER OR NOT TO PROCREATE. THE LAW FASHIONED FROM THE PENUMBRA RIGHTS IMPAIRS THE MAN'S RIGHT TO CHOOSE WHETHER OR NOT TO PROCREATE. THIS UNEQUAL TREATMENT OF THE LAW LEADS TO ABUSE IN THE AREA OF CHILD SUPPORT.

The lower courts failed to rule on this novel approach to a controversial issue. Petitioner asserts that these issues are now ripe for review. Petitioner argues that the failure to allow men an equal voice in the decision to bear a child does give rise to a level of a constitutional violation of privacy in whether or not to choose to procreate. The obligation of child support and the responsibility should not be placed upon the male from the mother's unilateral and constitutional right to bear a child without consent. An exparte order of blood testing to prove paternity, and then issuing an order of child support from a unilateral decision are unconscionable and leads to abuse.

The father's right to make an individual decision regarding procreation is unfairly superseded by the woman's right to choose to have the child. It has been held that the constitutionally protected right of privacy includes the right of an individual "**to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person the decision whether to bear or beget a child**" Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct 1029, 1038, 31 L.Ed 2d 349 (1972), Griswold v Connecticut, 381 U.S. 479 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). In Carey v. Population Servs., Inc., 431 U.S. 678 U.S. 678, 684-85, 97 S.Ct. 2010, 2015-16 52 L.Ed. 2d 675 (1977), the right of personal privacy includes interest in independence in making certain kinds of important decisions; among those decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, **procreation, contraception**, family relationship, and child rearing and education.

Fourth Amendment of the United States Constitution provides that (in pertinent part)

> The right of the people to be secure in their persons. . . against unreasonable searches and seizure, shall not be violated...

Article I, Section 5 of the Louisiana Constitution provides:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or **invasions of privacy.**

Respondents will argue that the woman has the right to choose whether or not bear a child without governmental intrusion or the consent or notification of the father. This right is a unilateral right given to the woman, alone. **Even though the male participated in consensual sex and not consensual procreation**, he does not have the right to participate in or to inform or instruct the mother either to bear or abort. Respondents will cite Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed 2d 147 (1973), Planned Parenthood of Central Missouri v Danford, 428 U.S. 52, 96 S.Ct 2831, 49 L.Ed. 788 (1976), Planned Parenthood of Southeastern Pennsylvania, 505 U.S. ___ ,112 S.Ct. 2791, 120 L.Ed.2d 674, (1992), for the rule that the female has a privacy right to choose whether or not to abort, the government nor man can infringe upon that privacy right, and the woman does not have to get the consent or notify the husband regarding her right to choose. In Planned Parenthood v. Danford, the Supreme Court addresses the concerns of maintaining a trusting relation and found itself in a dilemma regarding a bilateral agreement (marriage contract) between man and woman when deciding to choose to beget or bear a child. The Supreme Court states, "It seems manifest that, ideally the decision to terminate a pregnancy should be one concurred in by both the man and woman (husband and wife). No marriage (relationship) may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital issue." The court goes on at 428 U.S. 71, "We recognize, of course, that when a woman,... without the approval of her husband, decides to terminate her pregnancy (right to choose) it could be said that she is acting **unilaterally**." The Court goes on to say that inasmuch as it is the woman who physically bears the child and who is more

directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. The court stated that the woman does not have to get the consent from the man to choose to abort. However, Justice White's dissenting opinion in Roe v. Wade, states "the simply fashions and announces a new constitutional right for pregnant mothers (right to choose whether or not to bear a child/abortion) is improvident and extravagant exercise of the power of judicial review... I find no constitutional warrant for imposing such an order of priorities..." Justice White in his dissenting opinion in Planned Parenthood v. Danford, articulates that the State recognizes that the husband has an interest of his own in procreation or nonprocreation and this fundamental right should not be made unilaterally by the wife. On the contrary, in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) and in Kent v. Dulles, 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed.2d 1264 (1958), the Supreme Court states that the right of privacy is the right "to be let alone" and that the right includes the privilege of an individual to plan his own affairs, for, "outside areas of harmful plainly conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." The woman's unilateral vested constitutional protected right gives a woman the power, not only over the life or death of a child, but it also infringes upon a man's or husband's constitutional right to choose whether or not to procreate. According to Coe v. Gerstein, 376 F. Supp. 695 698,(S.D. Flor. 1974), the district court held that the father of an unborn child has an interest "possibly equal to those of the mother."

Petitioner contends that his constitutional right to privacy has been violated and invaded.

The individual right to privacy is the right to be left alone, to be free from governmental interference with his mind, body or autonomy... Houdroulis v Schuhmacher, 553 So. 2d 398 (La. 1989). See: Devlin, Privacy and Abortion Rights Under the Louisiana State Constitution, 51 La. L. Rev. 685 (1991).

Petitioner asserts that the man's privacy right to choose whether or not to procreate is being violated. The law in Roe v. Wade, was fashioned out of the penumbra rights which gave women more rights than men in the areas of procreation. Women came to the realization that they do not need to be married to have children, and prefer to have the ultimate say so over not only the child's life, but also the man's purse strings. Many women have used the child to control the man. Society has done an injustice to men by creating a false reality and a false sense of responsibility on the man based on a woman's unilateral right to have a child without the consent of the father.

It is axiomatic that the father has a right to privacy, but the government in an exparte manner forces the father to give blood without appointing counsel. If he is not excluded, he is ordered the father of the child. This is governmental intrusion at its best and leads to further abuse of the system.

II.

THE WOMAN'S UNILATERAL RIGHT TO CHOOSE IN CONNECTION WITH LOUISIANA PATERNITY ACT LSA 9:396 VIOLATES APPLICANT'S RIGHT TO PRIVACY AND FORCES AN OBLIGATION BASED ON A UNILATERAL DECISION.

Petitioner's individual constitutional right to privacy was implicated when compulsory blood testing was ordered by the court, and if the father is not excluded from population of men with the same characteristics as the child, the man will be ordered the

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LSA-R.S. 9:396 provides that:

A. ...in any civil action in which paternity is a relevant fact or in an action en desaveu, the court, upon its own initiative or upon request made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child, and alleged father to submit to the drawing of blood samples and shall direct that inherited characteristics in the samples,... be determined by appropriate testing procedures. If any party refuses, ... the court may..., enforce its order...

B. (1) The district attorney, in assisting the Department of Social Services in establishing paternity as authorized by R.S. 46:236.1 may file a motion... Upon exparte motion of the district attorney and sworn affidavit of the party alleging specific facts tending to prove paternity... the court shall issue an exparte order directing... the alleged father to submit to the collection of blood ...

(2) ...If the written report of the results of the initial test fails to absolve a party from the allegation of paternity, such report may be used by the district attorney or the department as evidence against the alleged father in any subsequent civil action for the establishment of paternity...

Article 240 of the Louisiana Civil Code provides that:

. . . illegimate children are entitled to Alimony from the acknowledge parents.

father of the child. If the man is the father of the child, then he owes financial support to the child. Again, these conditions are based on the woman's unilateral decision to bear the child.

The State concedes that the alleged father has the right to privacy to be free from unreasonable searches and seizures. The State goes on to say that these rights are not absolute and may be regulated when the State has a sufficiently strong interest in the matter.

(See: In the Interest of J.M., 590 So. 2d 565(La. 1991), Little v. Streater, 452 U.S. 1, 14, 101 S.Ct. 2202, 2209, 68 L. Ed, 2d 627(1980). The State government can not infringe upon her right to privacy. However, the government can infringe upon the father 's privacy right to choose whether or not to procreate. The Respondents (State) will contend that it has an important interest of pervasive concern for the welfare of its children and the conservation of the State's public assistance funds (the latter being the most important). Winston v. Lee, 470 U.S. 753,760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 2593 47 L. Ed. 2d 18 (1976); Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed. 2d 147 ((1972); Plaquemines Parish Commission Council v. Delta Development Co, Inc., 472 So.2d 560, 567-68 (La. 1985). However, in Lassiter v. Dept. of Social Services, 452 U.S. 18, 28, 101 S.Ct 2153, 2160 , 68 L.Ed.2d 640 (1981), Nordgren v. Mitchell, 716 F.2d 1335, 1338 (10 Cir. 1983), the financial cost to the State in providing the requisite procedural protection is an insufficient reason to deny those protection to an individual when such important constitutional interest are involved, ... The court stated that "...though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as

those here..." In Nordgren, the 10th Circuit Court of Appeals further determined that the State's "interest in monetary savings cannot outweigh the strong private interests of the putative father, the shared interests of the parties..." One must remember that it is the mother's decision to have the child (not the child) and in most cases the mother uses the child and the language, "What is in the best interest of the child," for sympathy as an advantage to effectuate her selfish agenda.

The alleged father's right to privacy to choose whether to procreate should not be outweighed by the state's interest in protecting the mother's fundamental right to make decisions relating to her pregnancy prior to childbirth, and should not be outweighed by the state's interest in conserving its public assistance funds.

To give a woman a unilateral constitutional right (in which both the man and woman are parties in creating a being) to decide whether to bear a child without consent of the father is discrimination based on gender.

Furthermore, statutes and laws which distinguish on the basis of gender are afforded an intermediate level of scrutiny. A statute or law which classifies on the basis of gender is constitutional if it serves "important governmental objectives" and is substantially related to achievement of those objectives Califano v Webster, 430 U.S. 313, 314, 97 S.Ct. 1192, 1193, 51 L.Ed. 2d 360 (1977); Craig v. Boren, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976). Again, the governmental interest in giving the mother a unilateral constitutional right to choose whether to bear a child over the father's privacy right to choose whether or not to procreate and then establishing paternity to pay for child support is fundamentally unfair and unconstitutional. The governmental interest in

establishing paternity is the protection of the welfare of the child and conservation of the State's public assistance funds are unconstitutional. The pecuniary interest of the State should not overcome private constitutional interest of the father's privacy rights. The paternity laws are unconstitutional because it allows abuse of the system and discriminates against males. This power not only applies to the area of abortion, but also to child custody, support, and visitation. In Arguendo, the State cites In Interest of J.M., 590 So. 2d 565(La. 1991) for the rule that LSA R.S. 9:396 is constitutional. This argument is of no moment because the Louisiana Supreme Court failed to address how the woman's constitutional unilateral right to choose to have a child in connection with LSA R.S. 9:396 violates the man's right to choose to procreate.

Petitioner avers that the State of Louisiana violates the man's right to equal protection of the law by providing counsel to represent the woman free of charge, but conveniently fails to provide an attorney for the man.

III.

WHETHER OR NOT EQUAL PROTECTION OF THE LAW HAS BEEN VIOLATED BECAUSE THE FEMALE IN PATERNITY ACTIONS IS AFFORDED AN ATTORNEY TO REPRESENT HER FREE OF CHARGE BUT THE MALE IS CONVENIENTLY NOT GRANTED AN ATTORNEY TO REPRESENT HIM.

Applicant asserts that since the statute R.S. 9:396 has criminal overtones, and in Norgren v. Mitchell, 716 F.2d 1335 (10th Cir. 1983), the court states that paternity

is an essential element of the crime of willful failure to support a child and must be proved beyond a reasonable doubt, appellant should be afforded counsel and read his rights. Petitioner asserts that even criminals are afforded a speedy trial, right appointed counsel, protection against self-incrimination and protection against unreasonable search and seizure. Ironically, the accused or putative father is not afforded these individual constitutional rights in child support matters. To apply the right to privacy unequally and the failure to supply attorneys to both parties is a violation of the Equal Protection Clause of the U. S. Constitution. It is unconscionable to request that a party pay an obligation for a decision made unilaterally. This one-sided obligation without consent is unenforceable.

Fourteenth Amendment of the United States Constitution provides that:

> No State shall deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 3 of the Louisiana Constitution provides that:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations..."

IV.

DEFAMATION AND SLANDER

WHETHER THE TRIAL COURT AFFIRMED BY COURT OF APPEALS ERRED IN DISMISSING PLAINTIFF'S DEFAMATION CLAIM.

THE DECISION OF THE COURTS BELOW IN FAILING TO ADJUDICATE WHETHER THE STATE AND THE DISTRICT ATTORNEY MAY CLAIM A CONSTITUTIONAL PRIVILEGE AGAINST LIABILITY FOR THE INJURY INFLICTED BY STATEMENTS OF DEFAMATORY FALSEHOODS OF PATERNITY.

Petitioner filed the action for defamation based on false statements made public through a petition to establish paternity filed by defendants. The petition was served by the District Attorney of the City of Amite, Louisiana, at his home in New Orleans, Louisiana. This caused a strain in petitioner's marriage, defamed his professional reputation with his employer, and his reputation as a Jehovah witness. As a general rule, words which produce any perceptible injury to the reputation of another, either generally or with respect to a person's occupation, are called defamatory. A communication is considered defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him, or if it tends to expose him to public

hatred, contempt, or ridicule. Libel is defined as a malicious publication, expressed either in printing or writing, or by signs and pictures, tending ...to blacken the reputation of one who is alive, and exposes him to public hatred, contempt, or ridicule. Slander is the speaking of defamatory words which tend to injure another in his reputation, office, trade business, or means of earning a living.

According Gertz v Welch, 418 U.S. 323, 41 L Ed 2d 789, 94 S.Ct. 2997 (1974), defamatory falsehoods about a private citizen is actionable under the appropriate standard of liability. The legitimate state interest underlying the law of defamation is compensation of individuals for the harm inflicted on them by defamatory falsehood. The Supreme Court, in Gertz, held that the State may define for themselves the appropriate standard of liability of defamatory falsehood injurious to a private individual. Article 2315 et seq. of the Louisiana Civil Code and LSA R.S. 14:47 are the appropriate State liability statutes.

According to Luster v. Retail Credit, Co., 575 F.2d 609, Regan v. Sullivan, 557 F.2d 300, Montgomery Ward &Co. v. McGraw Hill Pub. Col, 146 F.2d 171, and 53 C.J.S. Section 38 Libel and Slander, the general rule is that any written or printed statement which falsely charges another with the commission of a crime is libelous per se. As a general rule, words, whether written or **spoken,** are defamatory or actionable per se, i.e., without proof of special damages if the words directly tend to prejudice or injure anyone in his or her profession, trade or business. The question is whether

the oral statement was in fact understood to be defamatory or to refer to the plaintiff is a question for the jury. Whether the statements are actionable is a question of law. According to Gugliuzza v. K.C.M.C., 606 So. 2d 790 (La. 1992), the Louisiana Supreme Court held that criminal statutes are not definitive of civil liability, but they may be guidelines for the court in fixing civil liability. To determine existence of civil duty, court's inquiry focuses on whether statute was intended to protect particular plaintiff from the type of harm which ensued. According to Cangelosi v. Schwegmann Bros. Giant Super Markets, 390 So. 2d 196 (La. 1980), In order to prevail in a case of defamation, the plaintiff must prove five elements: defamatory words, publication,

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Louisiana Civil Code Articles 2315, 2316, and 2317 address the issues of negligence and liability.

Article 2315 provides that:

> Every act, whatever of man, that causes damage to another obliges him by whose fault it happened to repair it.

Article 2316 provides that:

> Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

Article 2317 provides that:

> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody.

falsity, malice (actual or implied) and resultant injury. Language is defamatory when it tends to expose the plaintiff to contempt, hatred, ridicule or obloquy, or causes her to be shunned or avoided, or has a tendency to deprive her of the benefits of public intercourse. Madison v. Bolton, 102 So. 2d 433 (1958). Words that impute crime to another are defamatory **per se**; proof of malice is not required. When words are defamatory per se, falsity and malice are presumed and burden shifts to defendant to rebut the presumption. Elmer v. Coplin, 485 So. 2d 171 (La. App. 2d Cir. 1986), writ denied, 489 So.2d 246(La. 1986), Melancon v. Hyatt Corporation, 589 So. 2d 1186 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 411 (La. 1992). Publication means the

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Louisiana Criminal Code 14:47 states that:

> Defamation is the malicious publication or **expression in any manner**, to anyone other than the party defamed, of anything which tends:
>
> (1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence or social intercourse; or
>
> (2) To expose the memory of one deceased to hatred, contempt or ridicule; or
>
> (3) To injure any person, corporation, or association of persons in his or her business or occupation.
>
> Whoever commits the crime of defamation shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

communication of non-privileged defamatory words to **even one single person**. Martin v. Lincoln General Hospital, et al., 588 So 2d 1329 (La. App. 2 Cir. 1991), Toomer v. Breaux, 146 So.2d 723 (La. App. 3d Cir. 1962).

The right to privacy embraces four different interests, each of which may be invaded in a distinct fashion. Cox Bradcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1975); Jaubert v. Crowley Post-Signal, Inc., 375 So.2d 1386, 1388 (La. 1979); Prosser, Law of Torts, 4th ed. (1971), Restatement Second of the Law of Torts (1959). One type of invasion takes the form of the appropriation of an individual's name, for the use or benefit of the defendant. Another type of invasion occurs when the defendant unreasonably intrudes upon the plaintiff's physical solitude or seclusion. The third type of invasion consists of publicity which unreasonably places the plaintiff in a false light before the public. Furthermore, In Doe v. Doe, 941 F.2d 280 (5th Cir. 1991), the Fifth Circuit held that under Louisiana law, allegedly defamatory statements may impute crime without using express terms or technical accuracy. In Doe, the court addresses the tort of invasion of privacy and cites the Restatement Second of the Law of Tort for the proposition that allegedly false statements that impute crime is an invasion of privacy torts. A violation constitutes a breach of duty, or fault, and may be actionable under Louisiana Civil Code Article 2315. An actionable invasion of privacy occurs only when the defendant's conduct is unreasonable and seriously interferes with the plaintiff's privacy interest. Defendants unreasonably intrude upon the plaintiff's physical solitude or seclusion.

Since LSA-R.S. 9:396 has criminal overtones, and

in Norgren v. Mitchell, 716 F.2d 1335 (10th Cir. 1983), the court states that paternity is an essential element of the crime of willful failure to support a child and must be proven beyond a reasonable doubt; this is a quasi criminal act punishable by jail or fines. Applicant states that charging another with the commission of a crime is libelous per se crime. If the allegations are false, then it is actionable and appellant should be allowed to put on his case in chief. The statement of petition to establish paternity is libelous per se if the offense is indictable, involves moral turpitude. Under the Restatement 2d, Torts Section 574, one who publishes a slander that imputes serious sexual misconduct to another is subject to liability to the other without proof of special harm. 50 Am Jur 2d Section 192.

The lower courts erred because the exparte order to give blood invades appellant's privacy rights. Appellant asserts that since the statute R.S. 9:396 has criminal overtones, and in Norgren v. Mitchell, 716 F.2d 1335 (10th Cir. 1983), the court states that paternity is an essential element of the crime of willful failure to support a child and must be proved beyond a reasonable doubt. Appellant will suffer irreparable harm if he is not excluded from the population.

It may be argued that defamatory matter published in the course of judicial proceeding is absolutely privileged is applicable to complaints in criminal proceedings. 53 C.J.S. Section 75 Libel and Slander. However, according to C.J.S. Section Malicious Prosecution, Malicious Prosecution lies to compensate an individual who is maliciously hailed into court and forced to defend against a fabricated cause of action. Maryville Academy v. Loeb Rhoades & Co., Inc., 530 F.Supp 1061 (D. C. 1973) Petitioner asserts that the defendant(s)

injured him by filing this frivolous false petition and lawsuit against him.

CONCLUSION

The basic overlooked premises are whether consensual sex is consensual procreation and whether it is fair to force an obligation of child support on both parties (bilaterally), when **legally** the decision to bear the child is the woman's unilateral right (hers alone).

The father's right to make an individual decision regarding procreation is unfairly superseded by the woman's right to privacy to choose whether or not to bear a child or to abort. The failure to allow men an equal voice in the decision to bear or beget a child does give rise to a level of a constitutional violation of privacy in whether or not to choose to procreate.

Petitioner avers that the scheme and system by allowing the woman a unilateral constitutional right to choose to bear a child without the consent from the father, in connection with filing a paternity suit infringes upon the man's right to privacy and forces child support obligations without the father's consent should be unconstitutional and the obligation unenforceable. The obligation of child support and the responsibility should not be placed upon the man from the mother's unilateral constitution right to decide whether or not to bear a child.

The law in Roe v. Wade, was fashioned out of the penumbra rights which gave women more rights than the men in areas of procreation. Ironically, the right to choose to bear a child is the woman's decision alone (unilateral decision), but the government places the responsibility on both parties. The significance or consequence is that unilateral decision to have a child, and then, forcing an obligation of child support on the man is unfair and unconscionable. The court, women,

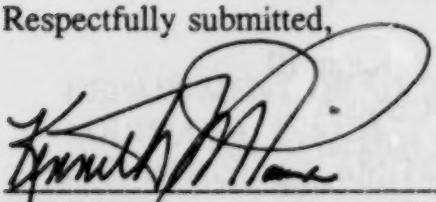
the government, media, and society has done an injustice to men by fashioning law from the penumbra rights allowing a unilateral decision based on a bilateral act and, then the State mandates that the responsibility to be bilateral. **The sophism in the law is that consensual sex is not consensual procreation**.

Furthermore, women, the courts, the legislature, and the media, have created a false reality and a false sense of responsibility on the man-- based on a woman's unilateral right to bear the child. This sophism and fallacy are used as a foundational block and perpetuates abuse in the area of child support and visitation. This false foundation and defective legal engineering have flaws which need fixing. Currently and ironically, the man is now being ridiculed, embarrassed, labeled irresponsible; and then coerced into paying child support based on a woman's unilateral decision to have the child. The decision to bear the child without consent has a devastating effect upon the man's future and economic stability. Society, media, aided by the law and courts, has changed its views of children born out of wedlock. In the past, a woman was ridiculed and embarrassed for having a child out of wedlock. It was the parents that controlled courtship, and it was expected that the woman be a virgin before marriage. This was done to keep the integrity and legitimacy of knowing the child was born of the father. However, in the last thirty years, there have been changes in the law and in society that allow women more equality (the right to choose to bear a child/abortion without the consent of the government or the man). There was a change in technology-- Blood Testing and DNA testing (which is not an exact science) to determine paternity. The advantage and scheme are: (1) a woman decides to have the child, (2) the woman files for

paternity and support, (3) the State gets involved and represents the woman to protect the State's revenue, (4) a compulsory blood test is ordered by the court, (5) the man is not excluded from the population, (6). the State coerces a consent judgment with threats of jail and sanctions, (7) child support is ordered against the man--all from a unilateral decision.

Petitioner prays that this Honorable Court grant the petition for writ of certiorari and prays that the lower courts' decision be reversed and remanded with regards to the defamation complaint.

Respectfully submitted,



KENNETH M. PLAISANCE 19738
NORTH MIRO STREET
NEW ORLEANS, LA 70119
504 945-4176
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I hereby certify that on this 8th day of November, 1996, forty copies of the above and foregoing Petition for Writ of Certiorari were mailed to the Clerk of the Supreme Court of the United States of America, Washington D.C. I certify that two true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to the person(s) identified below by depositing the same in the United States mail at New Orleans, Louisiana, first class, postage prepaid, and properly addressed to:

Duncan S. Kemp III
District Attorney
Twenty-First Judicial District
312 East Oak Street
P. O. Box 608
Amite, Louisiana 70422

Richard P. Ieyoub
Attorney General of Louisiana
State Capital , 22nd Floor
P.O. Box 94005
Baton Rouge, LA 70804-9005

KENNETH M. PLAISANCE

APPENDIX A– AFFIRMATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Filed August 12, 1996

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 96-30038

Summary Calander

LARRY HARDY,

Plaintiff-Appellant,

versus

DEPARTMENT OF SOCIAL SERVICE , STATE OF LOUISIANA, DISTRICT ATTORNEYS' OFFICE FOR THE PARISH OF AMITE, AND DIANE OSBY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Louisiana
95-CV-2437-T

Before JONES, DEMOSS AND PARKER, Circuit Judges.

PERCIAM:

In this appeal, Larry Hardy challenges the district court's refusal to grant declaratory and injunctive relief against the operation of LSA R.S. 9:936, the Louisiana Paternity Statute. Hardy was named in a paternity suit filed in Tangipahoa Parish, provoking him to institute this action, but the paternity case was almost immediately dropped, apparently because of mistaken identity. Hardy nevertheless wished to pursue a challenge to the statute's constitutionality and a defamation action against the

appellees including the district attorney and maternal complainant.

Hardy makes no attempt even to argue on appeal that his challenge to the statute's constitutionality is not moot. The paternity case against him was dismissed only sixteen days after he filed this federal lawsuit, and he was never required to submit to a blood test. He no longer has any legitimate contest with the city, county or state authorities regarding the statute. The district court properly dismissed this part of his case.

Hardy also contends that the district court's dismissal of his defamation claim should be reversed and remanded for further proceedings. We are not certain why the district court dismissed this claim, inasmuch as Hardy declined to furnish a transcript, and the district court's order, contained in the record excerpts, states that the judge dismissed "for reasons enunciated in open court." Nevertheless, it appears obvious that the court dismissed either because Hardy's allegation of defamation are wholly vague and conclusional or because the judge believed that state law claim is not better heard in state court. Either of these grounds is fully sustainable on appeal. Hardy's brief to this court make no effort to explain the facts behind the defamation claim, his pleading in the trial court were similarly sketchy, and there is no record that he attempted to amend.

For these reasons, the district court's judgment of dismissal, without prejudice as to the defamation claim only, is AFFIRMED.

APPENDIX B-- MANDATE FROM DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ISSUED ON 12/18/95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LARRY HARDY, Plaintiff,	CIVIL ACTION
VERSUS	NO. 95:2437
PARISH OF TANGIPAHOA	SECTION "T"

JUDGMENT

The Court having denied the Preliminary Injunction and Declaratory Judgment of plaintiff, Larry Hardy on August 17, 1995, and December 14, 1995, respectfully; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED, that there be a Judgment in favor of defendants and against plaintiff Larry Hardy.

New Orleans, Louisiana, this 14th day of December, 1995.

G. Thomas Porteous, Jr.
United States District Judge

Supreme Court, U.S.
FILED
DEC 18 1996
CLERK

No. 96-749

In The

Supreme Court of the United States

October Term, 1996

LARRY HARDY,

Petitioner,

versus

DEPARTMENT OF SOCIAL SERVICE, STATE OF LOUISIANA, DISTRICT ATTORNEY'S OFFICE FOR THE PARISH OF AMITE, AND DIANNE OSBY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

DUNCAN S. KEMP, III
21st Judicial District Attorney
Post Office Drawer 639
Amite, Louisiana 70422
Telephone: 1-800-572-0083

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Didier v. Fasola, 597 So.2d 450 (La. App. 1 Cir. 1991) 11

Golde v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969) 7

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) 6, 8

Landry v. Robertson Advertising Svc., Inc., 660 So.2d 194 (La. App. 4 Cir. 1995) 15

Little v. Streater, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981) 12, 13

McMullen v. McMullen, 594 So.2d 926 (La. App. 3 Cir. 1992) 11

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 4

SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972) 7

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) 8, 12

Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) 5

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) 4, 13

State v. McHugh, 630 So.2d 1259 (La. 1994) 8

State v. W.A.S., 629 So.2d 1209 (La. App. 1 Cir. 1993) 12

State of Louisiana, In Interest of A.C., 643 So.2d 719 (La. 1994) 8

TABLE OF AUTHORITIES – Continued

Page

State of Louisiana, In Interest of J.M., 590 So.2d 565 (La. 1991) 9, 10, 11, 12

U.S. v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950) 7

STATUTES:

LSA-R.S. 9:305 14

LSA R.S. 9:396 ..... 7, 9, 10, 11, 17

STATEMENT OF THE CASE

Defendant-respondent, the State of Louisiana, through the Twenty-First Judicial District Attorney, Duncan S. Kemp, III, has been incorrectly referred to in the Petition for Writ of Certiorari as "District Attorney's Office for the Parish of Amite".

Dianne Osby applied to the State of Louisiana for financial assistance for her minor child. Ms. Osby named the father as being "Larry Hardy." Subsequently, civil proceedings commenced in the Twenty-First Judicial District Court by way of a petition to establish paternity and support. Subsequent thereto, the petitioner now before this Court, Larry Hardy, was ordered to appear and show cause, if any he had, why he should not be ordered to prove paternity. In open court on or about August 18, 1995, Dianne Osby disavowed paternity by Larry Hardy when she stated that petitioner was not the same "Larry Hardy" with whom she had engaged in sexual intercourse and, thus, the Mr. Hardy who was present in court was not the father of her child. Immediately upon disavowal, the state court dismissed the petition to establish paternity and support.

The petitioner then sought a declaratory judgment in the United States District Court, Eastern District of Louisiana, declaring Louisiana Revised Statute 9:396 unconstitutional, and further seeking to declare that a woman's unilateral right to choose whether to abort or give birth to a child is unconstitutional. On December 18, 1995, judgment was entered by the United States District Court, Eastern District of Louisiana, denying declaratory judgment and dismissing petitioner's claim for defamation.

The petitioner then appealed to the United States Court of Appeal, Fifth Circuit. On or about August 12, 1996, the Fifth Circuit affirmed the lower court's ruling.

It is upon said ruling that petitioner, Larry Hardy, now seeks review by this Honorable Court.

SUMMARY OF THE ARGUMENT

Larry Hardy claims that women have more rights than men in deciding whether to abort or give birth to a child. He also urges that consensual sex is not consensual procreation.

Constitutionally protected liberty includes freedom from governmental interference with intensely personal decisions (such as whether or not to give birth to a child). To enact legislation that would give the father of an unborn child the right to decide whether or not that child would be born, would grossly violate the constitutional rights of the mother. Furthermore, the State of Louisiana has a compelling interest in the welfare of its children, especially when mothers require financial assistance to care for their children. To say that a woman should be compelled under any circumstances to abort her child, and more so because the father of that child refuses or is unable to pay child support, would be manifest error and violative of a woman's basic civil rights.

On the other hand, where ordering an individual to submit to blood testing to determine paternity (for the collection of child support) serves a special governmental need outside of the ordinary law enforcement context,

such an infringement upon that right is justified by regulations which have been adopted to serve compelling state interests and cannot be otherwise achieved through means significantly less restrictive of privacy freedoms. The long established standard of the "best interest of the child" far outweighs an alleged father's right to privacy against intrusions by mandated blood testing. Thus, the statutes requiring such tests do not violate due process.

Proceedings to establish paternity are civil in nature. Mr. Hardy complains that putative fathers should be provided free legal representation when being compelled to prove paternity. While it is true that an accused has the right to an attorney at all stages of prosecution, Mr. Hardy was not accused of an indictable crime. Furthermore, he was not even found to be the father of Ms. Osby's child. Upon being served with the petition for paternity and the order to show cause, a prudent man, while knowing that paternity was an impossibility, could conceivably pick up a telephone and call the District Attorney's office to inquire into the matter further. By providing proof of identification, or a copy of his Louisiana driver's license, Mr. Hardy could have hastened his dismissal from those proceedings since it was another "Larry Hardy" who had fathered Ms. Osby's child.

Petitioner alleges defamation, but fails to set forth the **specific manner** in which he claims to have been defamed, as well as any **resultant injury** he may have sustained. To merely state that the paternity proceedings put a strain on petitioner's marriage does not meet the essential elements required to make a showing of defamation and slander.

ARGUMENT

I. Petitioner asserts that a woman's right to choose whether to abort or bear a child infringes on a man's "constitutional" right to choose whether or not to procreate, thus, resulting in unequal treatment of the law and abuse in the area of child support.

The petitioner candidly states his belief that a woman's constitutionally protected rights allow her the power of life or death of an unborn child and, thus, those protected rights infringe upon a man's right to choose whether or not to procreate. While claiming this issue is ripe for review, petitioner attacks this Court's ruling in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), by summarily arguing that women have more rights than men in deciding whether to abort or bear a child, "**even though the male participated in consensual sex and not consensual procreation**".

This moral issue is perhaps as old as time itself, and it could be said that every human being is confronted, at some point in their lifetime, with making a personal choice of whether to engage in consensual sexual intercourse outside the bonds of matrimony. An individual's constitutionally protected interest in his mind, thoughts and mental processes has been recognized by this Court prior to the adoption of the Louisiana Constitution. The operations of the mind are absolutely beyond the power of government to control. *See Stanley v. Georgia*, 394 U.S. 557, 565-66, 89 S.Ct. 1243, 1248-49, 22 L.Ed.2d 542 (1969). Engaging in consensual sexual intercourse is an exercise of free will, and each member of the human race should be prepared to undertake all responsibilities which derive

from the very act to which they consented to perform. Reasonable minds must agree that individuals assume moral and legal responsibility for their voluntary actions, particularly when engaging in consensual sexual intercourse, knowing the possibility of pregnancy, which may later become obligatory in nature. Oftentimes legal obligations attach to choices of free will.

Simply stated, petitioner takes issue with the rights that allow a woman alone to decide whether to abort or bear a conceived child. Constitutionally protected liberty includes freedom from governmental disclosure or interference with certain kinds of intensely personal decisions. *Skinner v. Oklahoma,* 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-14, 86 L.Ed. 1655 (1942). To enact legislation which would enable a man to decide when or if a woman should abort an unborn child would run afoul of the equal protection clause. While addressing the constitutionality of Oklahoma's Habitual Criminal Sterilization Act, this Court held in *Skinner, supra,* that:

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . .There is no redemption for the individual whom the law touches. . . .When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. . . . " *Skinner* at 541.

Hypothetically, applying this standard to legislatively enforced abortion enacted solely for the purpose of allowing a man an equal choice in abortion or childbearing would be invidious discrimination and offers no redemption for that woman and her unborn child. Such legislation would violate the most sacred right to be left alone from governmental intrusion, that being a woman's right to have offspring. Furthermore, the law would be unequal to other individuals found in the same circumstances, where another man may choose not to compel a woman to abort an unborn child. Such a statute would invade a woman's right to personal liberty, (embodied in the Due Process Clause of the Fourteenth Amendment), as well as the right to personal, marital, familial, and sexual privacy that is protected by the Bill of Rights and its penumbras, and rights reserved by the Ninth Amendment. *See Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

Clearly, there is no merit to petitioner's claim of discrimination and unequal treatment.

II. Petitioner alleges that Louisiana Statutes Annotated – Revised Statute 9:396 (Paternity Act) violates petitioner's right to privacy, where a woman's right to bear a child forces an obligation upon the man.

The petitioner claims that his right to privacy was "implicated". The respondent avers that petitioner's right to privacy was not breached. Larry Hardy was not required to submit to blood testing, thus, no obligation to pay child support was forced upon him. The usual rule in

federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972). The state court proceedings to establish paternity were immediately dismissed against Larry Hardy when Ms. Osby declared in open court that Mr. Hardy was not the father of her child. That disavowal of paternity rendered petitioner's case moot. The possibility of repetition is so remote as to render Larry Hardy without standing to undertake this litigation.

The petitioner claims that an ex parte order to submit to blood testing invaded petitioner's right to privacy, and he premises that claim by alleging unconstitutionality of the method by which a putative father can be compelled to submit to blood testing for a determination of paternity. Mr. Hardy further complains that if the man is determined to be the father of the child, then he owes financial support to the child and, thus, a responsibility has been placed upon him because of a woman's decision to bear the child instead of aborting. The legal and moral obligation of financially supporting a child should be of tantamount concern not only to the parents, but to the state and community in which that child lives. The Louisiana Legislature has recognized this obligation and has provided for the welfare of its children by enacting legislation such as Louisiana Revised Statute 9:396.

Of greater significance, this petitioner was not compelled to submit to blood testing when this matter came

on for hearing at the state court level. He merely argues that the method set forth under Louisiana Revised Statute 9:396 is unconstitutional.

The right to privacy is not absolute. In most criminal cases, the permissibility of a particular intrusion depends on the prerequisite of probable cause and a warrant, or the existence of an established exception to these requirements. Where a privacy right intrusion is sufficiently less intrusive than an arrest and serves special governmental needs outside of the ordinary law enforcement context, such an infringement on that right may be justified by regulations adopted to serve compelling state interests that cannot be achieved through means significantly less restrictive of privacy freedoms. *See State v. McHugh*, 630 So.2d 1259 (La. 1994); *citing State v. Perry*, 610 So.2d 746 (La. 1992); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Certain governmental invasions have been treated as intrusions of a protected interest of privacy, although they eventually were upheld on a showing of clear necessity, procedural regularity, and lack of risk, trauma or pain to the individual, as in the instant matter. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

In *State of Louisiana, In Interest of A.C.*, 643 So.2d 719 (La. 1994), the Louisiana Supreme Court, while addressing constitutionality, held that:

> "When a court finds a reasonable way to do so, 'it must construe a statute so as to preserve its constitutionality.' ***The means to do so can be obtained from the text of the statute itself.***" (emphasis added)

The constitutionality of Louisiana Revised Statute 9:396 was specifically addressed by the Louisiana Supreme Court in *In the Interest of J.M.*, 590 So.2d 565 (La. 1991). In that case, the mother of a minor child filed a paternity action against both her former husband, to whom she was married but separated from at the time of the child's conception, and "Mr. Z.", with whom she had allegedly had an exclusive sexual relationship near the time of conception. During the course of the lawsuit, the mother of the child requested that the court order blood testing of the defendants. In response, Mr. Z filed a motion for declaratory judgment regarding the constitutionality of the statute, resulting in a ruling by the trial court declaring LSA-R.S. 9:396 unconstitutional. In reversing that ruling, the Louisiana Supreme Court held:

> "A court order for blood testing to determine paternity is . . . a search and seizure within the meaning of the Fourth Amendment. . . . [T]he question at issue . . . is whether a court ordered blood test is reasonable and justified under the circumstances.
>
> A blood test is minimally intrusive, relatively painless, and medically safe. In facilitating a determination of paternity, blood tests are highly reliable and unequaled in evidentiary value."

Although an alleged father has a right to privacy and to be free from unreasonable searches and seizures, "those rights are not absolute and may be reasonably regulated when the State has a sufficiently weighty interest" because of its concern for the welfare of its children and in the interest of conservation of the State's public assistance funds. A minor child has a right to support

from its parents, and when public assistance has been requested by a mother, there exists a duty to determine the issue of paternity for enforcement of child support. *In the Interest of J.M., supra.*

In the instant matter, Dianne Osby, the mother of the minor child, provided the State of Louisiana with the name of "Larry Hardy" as being the father of her child. Upon being notified of the paternity proceedings, Mr. Hardy could have simply provided a copy of his Louisiana driver's license to correctly identify himself, which would have further hastened his discharge from the proceedings. However, he failed to do so. Ultimately, Mr. Hardy was ordered to show cause why he should not be compelled to submit to blood testing for the establishment of paternity in the matter of *State of Louisiana, in the Interest of Dianne Osby v. Larry Hardy,* Twenty-First Judicial District Court, Tangipahoa Parish, State of Louisiana, Docket Number 9501317. Mr. Hardy appeared before the trial court on the appointed date. However, when Dianne Osby was asked if the father of her child was in the courtroom, she replied no. The proceedings were then dismissed against Mr. Hardy *prior to his being ordered to submit to a blood test.* By compelling Larry Hardy to appear at the rule to show cause, the District Attorney's office was assisting the State in attempting to establish paternity as provided for in LSA-R.S. 9:396, which states:

> "The district attorney, in assisting the Department of Social Services in establishing paternity as authorized by R.S. 46:236.1, may file a motion with a court of proper jurisdiction and venue prior to and without the necessity of filing any other legal proceeding. Upon ex parte motion of

> the district attorney and sworn affidavit of the party alleging specific facts tending to prove paternity and other facts necessary to establish the jurisdiction and venue of the court, the court shall issue an ex parte order directing the mother, child, and alleged father to appear at a certain date and time to submit to the collection of blood or tissue samples, . . . "

As noted by the Third Circuit Court of Appeal in *McMullen v. McMullen*, 594 So.2d 926 (La. App. 3 Cir. 1992), the admission of a mother that a certain man was not the father of her child would have sufficient evidentiary force to establish a disavowal of paternity, as was the case in the instant matter.

Petitioner asserts that Louisiana Revised Statute is in direct violation of his right to privacy and equal protection afforded by the United States Constitution and its penumbras, as well as the Louisiana Constitution. LSA-R.S. 9:396 does not violate a putative father's equal protection rights where the establishment of paternity and conservation of public assistance funds are important governmental objectives. *In Interest of J.M., supra.*

The State's interest in establishing paternity through reliable, scientific methods outweighs an alleged father's right to privacy against intrusions by mandated blood test, so that statutes requiring such tests do not violate due process. *Didier v. Fasola*, 597 So.2d 450 (La. App. 1 Cir. 1991). Furthermore, the requirement of blood tests in proceedings in which paternity is an issue does not constitute an **unreasonable search and seizure**. *Didier, supra.*

The Fourth Amendment to the United States Constitution provides individuals with protection from unreasonable searches and seizures. In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Supreme Court held that the drawing of blood for DWI blood testing did not infringe upon Fourth Amendment rights, and held:

> " . . . the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

In *State of Louisiana v. W.A.S.*, 629 So.2d 1209 (La. App. 1 Cir. 1993), the First Circuit Court of Appeal opined that:

> "Because of the strong societal interest in the determination of parentage of minor children and the minimal intrusion involved, we find that court-ordered blood testing in paternity cases is constitutionally permissible if justified under the circumstances of the particular case. La. R.S. 9:396 is reasonably construed by this [c]ourt to require a proper showing in a show cause hearing before issuance of an order for compulsory blood testing. The statute is therefore not unconstitutional, because, so construed, it does not violate the prohibition against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution or Article I, Section 5 of the 1975 Louisiana Constitution. . . . " [*See In the Interest of J.M.*, 590 So.2d at 567 568, 570, 572.] [emphasis added]

The value of blood grouping tests in paternity cases is well established. In *Little v. Streater*, 452 U.S. 1, 101 S.Ct.

2202, 68 L.Ed.2d 627 (1981), the Court declared the required blood grouping tests to be made available to indigent defendants in view of the unique quality of these tests as a source of evidence. When paternity is an issue, the use of blood tests provides the court and all parties with "a wholesome aid in the quest for truth. . . . Their reliability as an indicator of the truth has been fully established." *Little v. Streater,* 101 S.Ct. at 2207. In addition, the pervasive "best interest of the child" standard encourages the use of the most reliable and accurate means for identifying the truth in contested paternity suits. Blood grouping tests supply the courts and the parties with just such information. The intrusion to a party to undergo testing is justified in the given circumstances of paternity cases.

In the instant matter, Larry Hardy was not ultimately required to submit to blood testing. Therefore, a disavowal was not required.

The petitioner further asserts that a woman's unilateral right to choose to bear a child infringes upon a man's right to procreate and, thus, is unconstitutional. An individual's constitutionally protected interest in his mind, thoughts and mental processes was also recognized by the United States Supreme Court prior to the adoption of the Louisiana Constitution. The operations of the mind are absolutely beyond the power of government to control. *See Stanley v. Georgia,* 394 U.S. 557, 565 66, 89 S.Ct. 1243, 1248-49, 22 L.Ed.2d 542 (1969).

It is clear from the present case that application of the statutory scheme (1) furthers the State's compelling interests in determination of paternity, (2) serves a special

governmental need outside the ordinary law enforcement context, and (3) requires only a slight intrusive impact consisting of interference sufficiently less invasive than an arrest. The State's compelling and special objectives, *i.e.*, the welfare of a minor child, cannot be achieved through means significantly less restrictive of privacy freedoms.

III. Petitioner urges a violation of equal protection where a woman is afforded an attorney to represent her "free of charge" in a paternity action initiated by the State, but the putative father is not afforded an attorney.

The petitioner claims his rights have been further violated because putative fathers are not provided with free legal representation when appearing in court to avow or disavow paternity. When a paternity action is commenced for the sole purpose of determining the proper payor in child support cases, the State initiates proceedings in the interest of the mother and child, which are civil in nature. If the husband, or legal father who is presumed to be the father of the child, who because of misrepresentation, fraud, or deception by the mother, erroneously believed that he was the father of the child, then the time for filing suit for disavowal of paternity shall be suspended during the period of such erroneous belief, or for ten years, whichever ends first. Louisiana Revised Statute 9:305. Simply stated, a man erroneously believed to be the father of a child in paternity proceedings has recourse in the nature of civil proceedings. Failure to provide a putative father with legal counsel at the time of his appearance in court to avow or disavow

paternity is not a violation of petitioner's constitutional rights.

In civil proceedings, an indigent party may petition the court to proceed *in forma pauperis*. Likewise, in criminal proceedings, the State of Louisiana provides a method by which indigent defendants may receive legal representation. However, to state that a putative father should be provided free legal representation at the time he appears in court to avow or disavow paternity would clearly be an abuse of the legal system.

IV. Did the lower courts err in dismissing petitioner's defamation claim?

The petitioner's final issues of whether the lower court erred in dismissing his defamation complaint, and whether false accusation of paternity is defamation and actionable per se, are moot. To prove defamation, Larry Hardy must prove (1) defamatory words, (2) publication, (3) falsity, (4) malice, actual or implied, and (5) resultant injury. *Landry v. Robertson Advertising Service, Inc.*, 660 So.2d 194 (La. App. 4 Cir. 1995).

In his brief, Mr. Hardy eloquently defines defamation, libel and slander, and specifically raises the question of whether false statements of paternity are defamatory. He goes on to say that the statement of petition to establish paternity is libelous. The phrase "if the offense is indictable", as used by petitioner, is the key to this issue. The State of Louisiana does not consider adultery, fornication, or paternity as crimes committed against the State. Thus, paternity is not an indictable offense, but is civil in nature.

Ms. Osby named "Larry Hardy" as being the father of her child. When Mr. Hardy, the petitioner herein, appeared in court at the show cause hearing, the court was informed by Ms. Osby that Mr. Hardy was **not one and the same Larry Hardy who fathered her child**. The proceedings were then dismissed against petitioner.

While it may be true that a strain was placed on petitioner's marriage as a result of the petition to establish paternity, the petitioner has failed to make a showing of the necessary elements of defamation and slander.

CONCLUSION

No actual controversy exists at this time. Mr. Hardy was properly dismissed from further proceedings when Ms. Osby informed the state court that he was not the father of her child. Thus, petitioner's claims are now moot.

There is no merit to petitioner's claim of discrimination and unequal treatment where a woman has the right to decide whether to abort or give birth to a child. To legislatively enact statutes for the sole purpose of giving a father an **equal** choice in deciding whether a woman should abort a child or give birth would be a gross deviation from the rights guaranteed that woman by the United States Constitution and its penumbras.

The petitioner fails to demonstrate any abuse by the State of Louisiana in legislatively enacting a statute that provides for the support of its minor children. In fact, Mr.

Hardy completely fails to demonstrate how he has sustained irreparable injury by defamation and slander because of Louisiana Revised Statute 9:396. The state court proceedings against petitioner were properly dismissed immediately upon confirmation by Dianne Osby that petitioner was not the same "Larry Hardy" who fathered her child.

Based upon the foregoing, respondent respectfully prays that this Honorable Court deny the Petition for Writ of Certiorari, and the lower courts' rulings previously rendered be affirmed.

Respectfully submitted,

21st Judicial District
Attorney

DUNCAN S. KEMP, III
District Attorney
Post Office Drawer 639
Amite, Louisiana 70422
Telephone: 1.800-572-0083

Attorney for Respondents